MAY 14 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 946

J. HERSCHEL HARDY,

Petitioner,

vs.

BANKERS LIFE & CASUALTY CO., et al.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, J. Herschel Hardy, respectfully prays this Court's writ of *certiorari* to review and reverse the decision of the Court of Appeals for the Seventh Circuit in this case.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals in this case is not yet officially reported. It is reprinted in full as Appendix I to this petition.

The final judgment of the District Court appealed from in this case is reprinted in full as Appendix II to this petition.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The opinion of the Court of Appeals was filed and its judgment was rendered April 12, 1956. Petitioner's Petition for Rehearing (Appendix III) was denied on April 27, 1956. (Appendix IV). The Court of Appeals amended its opinion on April 27, 1956.

This Court's jurisdiction is invoked under Section 1254 (1) of the United States Judicial Code (U.S. CA. Title 28, Sec. 1254 (1) which confers upon this Court jurisdiction to review decisions of the United States Courts of Appeals.

THE QUESTIONS PRESENTED FOR REVIEW.

The questions presented for review are:

Did the Court of Appeals err in holding on a motion for summary judgment, that the judgment of the District Court of Minnesota, and the releases executed pursuant thereto, November 7, 1952, was *res adjudicata* of Petitioner's cause of action, if any, and including the cause of action incident to the conspiracy and acts which took place after the date of the releases, to-wit, August 25, 1952, and of the Minnesota court judgment, November 7, 1952 and which subsequent acts, though not covered thereby, barred the Petitioner of any relief because as the Court of Appeals said, "The District Court had no jurisdiction over Fiscal, and no well-pleaded fact connects defendants with Fiscal's default?" In other words, does the release and the Minnesota District Court Judgment operate as to matters and things which were not then in existence in the subsequent conspiracy described in the Complaint and subsequently maturing or accruing because not factually well-pleaded?

STATEMENT OF THE CASE.

This action was brought to recover damages occasioned by the conspiracy among all the defendants originally named as shown in the Complaint (Tr. 4-101). Some of these defendants, who were not served, were dismissed on motion of the Petitioner after an abortive appeal was dismissed by the Court of Appeals (Tr. 123). Final judgment dismissing the case was entered (Tr. 123), from which an appeal was taken (Tr. 125). An appeal to the Court of Appeals asked for review of the judgment entered against the Petitioner which is based upon a motion for a summary judgment supported by an affidavit to which were attached exhibits, one of which was a release (Tr. 101-107). By stipulation, the record in a divorce case in Minnesota between Petitioner and his wife, in which Bankers Life and Casualty Co. (herein called "Bankers") and Great Plains Hotel Co., Inc. (herein called "International") were added defendants, was filed as a part of the record in this case to be available to any party (Tr. 108).

Because Respondents' position is that their affirmative defenses are adequate to sustain the judgment below, notwithstanding the truth of the allegations of the Complaint, the facts stated in the Complaint in respect of the origin and first stages of the alleged conspiracy are fully abridged below.

The Petitioner in 1948 was the owner or had an interest in some 120 hotel, apartment and other buildings of a value of Fifteen Million Dollars ($15,000,000) (Tr. 5). He was in need of cash to pay demands upon him by the Bureau of Internal Revenue (Tr. 23, Ex. 1). He applied to the

Respondent MacArthur for a loan to meet his tax needs. MacArthur first promised to make such a loan if the Petitioner would cause a corporation to be organized and the Petitioner would transfer to the corporation all his properties. All of the shares were to be issued to the Petitioner in exchange for his properties. MacArthur also promised to provide the Petitioner with a loan of at least $800,000 to be made by Bankers which was controlled by the Respondent, MacArthur, its president. MacArthur then demanded a bonus for making real estate mortgage loans to International upon the representation that he would cause loans to be made as high as 70% of the highest appraised value of the properties and would furnish to the corporation several million dollars for the purpose of acquiring new properties under that formula (Tr. 6-7). Relying on the promises and representations made by MacArthur, the plaintiff organized International. In consideration of the transfer of ten (10) shares of stock of International (being all the stock issued by it), Hardy, Petitioner transferred all of his properties to International (Tr. 5, 6, 7). This agreement was later formalized in a slightly modified form in Exhibit 1 attached to the Complaint (Tr. 21 to 24). Among other things, Hardy was to get, as President and Chief Officer of International, Thirty-five Thousand Dollars ($35,000.00) per annum, plus his expenses, for his work as chief executive officer of International for a period of two years. The stock was left in the care and custody of a safekeeper for the Respondent, MacArthur, and Bankers (Tr. 7). MacArthur was to arrange a loan to Hardy for $200,000 which was to be used by him for the payment of his income taxes and those of subsidiary corporations and other purposes, not for Hardy's personal benefit, except for the payment of his personal federal income taxes (Tr. 23). MacArthur was to arrange for additional loans in the amount of $800,000 secured by mortgages on real estate of International.

Thereafter, MacArthur, as part of his conspiracy, induced Petitioner to make him a beneficiary of insurance policies in the principal value in excess of Two Hundred Forty Two Thousand Dollars ($242,000.00), and committed other acts as follows:

He induced Hardy to make an irrevocable will, leaving all his personal property except Thirty Thousand Dollars ($30,000.00) to MacArthur (Tr. 8). Petitioner never received the Thirty Five Thousand Dollars ($35,000.00) per annum which he was to receive in accordance with Exhibit 1 (Tr. 8).

Never intending to keep his commitments, he, MacArthur, refused to make further loans to International after he had obtained the control of International until Hardy had endorsed the ten (10) shares of stock of International and delivered it to MacArthur (Tr. 8).

At MacArthur's suggestion, Hardy caused a Voting Trust Agreement to be drafted and presented to MacArthur, which MacArthur then refused to sign (Tr. 8 and 9).

First, Petitioner was to be paid $35,000 a year salary. Later, as shown by Exhibit 3, attached to the Complaint. MacArthur in May, 1950, promised that Petitioner would be paid Twenty Five Hundred Dollars ($2,500.00) a month, plus expenses, as his compensation (Exhibit 3, Tr. 36 and Tr. 9). This was paid for a period of five (5) months and was later cut off at MacArthur's direction (Tr. 9). MacArthur then demanded a collateral note signed by Petitioner to additionally secure Bankers on money advanced International (Tr. 9, Exhibit 4 attached to the Complaint, Tr. 38). In this document, MacArthur agreed to pay Hardy a minimum salary of One Thousand Dollars ($1,000.00) a month from September 1, 1950 until his death, but not to

exceed ten (10) years (Exhibit 4, Tr. 38); to pay all obligations incurred by Hardy in connection with the business of International and its subsidiaries; pay Hardy's income taxes for the years 1946 to 1949, both inclusive, etc. MacArthur caused Hardy to issue a note in the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) on his representations that it was needed as additional security on loans made by Bankers to International, to the payment of which was pledged all the stock of International, and later he wrote Hardy a letter in which he said that no personal judgment would ever be sought on the note and that "The sole security is the stock of International" (Exhibit 6, Tr. 41). Notice was given on September 4, 1951, in respect of foreclosing on the ten (10) shares of stock of International referred to above (Exhibit 6-A, Tr. 42). When the Petitioner offered to pay off such note and redeem his security, the Respondents refused to accept the tender made in cash of all money due on such note, Exhibit 6, attached to the Complaint (Tr. 42, Tr. 10).

In all these matters, MacArthur was aided by other Respondents who became part and parcel of the conspiracy to gain control and ownership of all Petitioner's properties. There are other nuances of this conspiracy set forth in paragraph 18 (Tr. pages 12 to 15) which need not be set forth in detail here.

In the month of March, 1952, Petitioner's wife sued him for divorce in Minnesota. In that action it was alleged that Bankers had possession and control of the property and estate of the Petitioner (Tr. 15 and 16). While this case was on trial, Bankers secretly paid over to Petitioner's wife the sum of Fifty Thousand Dollars ($50,000.00) and to Mrs. Hardy's attorneys, the sum of Fifteen Thousand Dollars ($15,000.00) for the purpose of obtaining their consent to a proposed stipulation. This money was paid

out of Petitioner's funds in the hands of the Respondents (Tr. 16). This culminated in an Order for Judgment, Findings of Fact, Conclusions of Law, Order and Stipulation attached thereto and marked Exhibit 7, attached to the Complaint (Tr. 44, 48). This document was dated June 3, 1952, and resulted in an Order (Exhibit 7, Tr. 43) dated November 7, 1952. In this document (Tr. 44-61), the Minnesota court, in terms, divided the properties originally owned by Petitioner between Hardy, Petitioner here, defendant there, his wife, Bankers and International. It gave Hardy seven shares of International stock and Mrs. Hardy 3 shares, (Tr. 47, 49) which she was to sell to Bankers for $125,000. (Tr. 54). In the meantime, through manipulations of MacArthur and his co-conspirators, new conspirators were added, and acts and deeds committed in the furtherance of said conspiracy with said new conspirators, effective after the date of the Minnesota release and the decree of the District Court of Minnesota had been entered.

Harold Knop, Leland Fikes Fiscal Agents, Inc., Southwest Mortgage & Loan Corporation negotiated with Hardy to purchase the interests acquired by him pursuant to the decree in the Minnesota divorce case, namely the seven shares in International. These negotiations culminated in Exhibit 8 attached to the Complaint. (Tr. 18, 61-96). By this agreement Fiscal Agents, Inc. agreed to buy Hardy's seven shares in International which were pledged to secure the payment of the note in the principal amount of $652,170.15 which International had executed in favor of Bankers pursuant to the Minnesota decree. The purchase price was $1,000,000. It was alleged that Knop, Fiscal Agents, Inc., Fikes and Southwest never intended to perform this agreement and that they were in the conspiracy with Bankers and MacArthur and the other defendants in entering into this agreement. (Tr. 16, 17).

It was further shown that pursuant to the conspiracy Fiscal defaulted on the note for $652,170.15 and months after the Minnesota decree and release, that Bankers, according to plan, foreclosed on the seven shares of International which Petitioner had pledged to secure payment of such note without notice to Petitioner and sold such at a mock auction sale for $340,000 to itself. Knop was rewarded for his part in the conspiracy to the tune of $65,000 and thus Hardy was purportedly divested of all of his properties, 120 in number of a value of $15,000,000. (Tr. 18, 19). This default took place in July 1953 several months after the Minnesota decree was entered on November 7, 1952.

The amended motion for summary judgment in substance shows the following:

1. That Petitioner's complaint constitutes a collateral attack on the judgment entered in the State District Court in Minnesota shown in Exhibit 7 attached to the Complaint (Tr. 43) prohibited by the Full Faith and Credit Clause of Section 1, Article 4 of the Constitution of the United States.

2. That Rule 60.02 of the Minnesota Rules of Civil Procedure shows that procedure which must be followed in order to obtain relief from a judgment obtained by fraud. Such action must be obtained within a year from the date of the entry of the judgment from which relief is sought.

3. That Petitioner is estopped to proceed with this case because in the Minnesota suit he pleaded that all his agreements with MacArthur and Bankers were in writing.

4. That because Petitioner's wife was a party to the action in Minnesota, she is an indispensable party here.

5. That Hardy's release is a bar to the instant action. As though attached to this motion is the complete record in the Minnesota action.

The motion is supported by the affidavit of one of the attorneys for the Respondents.

He verifies that he has personal knowledge that Exhibit A is a true and correct copy of an Indemnification Agreement between Bankers, International and Hardy and that Exhibit B is a true and correct copy of a release prepared and signed pursuant to the stipulation entered into between the parties in the Minnesota case. (Tr. 104). Both these documents are attached to the affidavit (Tr. 105, 106).

Nowhere was there any motion or attack directed against the Complaint to the effect that it failed to state a claim upon which relief could be granted, save and except for the matters set forth in the motion for summary judgment; nor was any motion or objection made with reference to the Complaint in connection with the facts as pleaded therein relating to the acts and the conspiracy which took place subsequent to the matters and things adjudicated in the decree of the Minnesota District Court, or mentioned and set forth in the release.

REASONS RELIED ON FOR THE GRANTING OF THE WRIT.

ARGUMENT.

I.

The Court of Appeals erred in affirming the order for summary judgment of the United States District Court, for the reason that the conspiracy and the acts performed in pursuance thereof, which occurred after the date of the release and the judgment in the Minnesota District Court, were not barred by said proceedings, nor was the question of the failure to properly plead the facts in relation to said subsequent conspiracy, and the acts committed pursuant thereto, raised by motion or objection of the respondents either in the District Court or Court of Appeals, and thereby petitioner has been denied his day in court and due process of law, since the motion for summary judgment and the affidavits filed in support thereof bear no relation to the subsequent conspiracy, and the acts performed in its consummation.

The Court of Appeals in its opinion correctly apprehended the sole issue before it in this cause when it said, "The only question before us is whether any genuine issue as to any material fact was raised by the pleadings. Rule 56 (c), Federal Rules of Civil Procedure, 28 U.S.C. That question largely turns on the effect to be given to the Minnesota judgment."

To the same effect that a motion for summary judgment will not be granted, if there is an issue of fact to be tried, see the cases of *Boerner* v. *U. S.* (D.C.N.Y.) 26 F. Supp. 769; *Ottinger* v. *General Motors Corp.* (D.C.N.Y.) 27 F.

Supp. 508. Questions of fact should not be decided upon motions for summary judgment— *U. S.* v. *Curtis Aeroplane Co.* (C.C.A. 2) 147 F. (2d) 639, rev'g. and remanding 50 F. Supp. 477, 52 F. Supp. 328.

On defendant's motion for summary judgment the facts stated in the Complaint must be taken as true. *McCombs* v. *West* (C.C.A. 5), 155 F (2d) 601, aff'g 63 F. Supp. 469; *Iversen* v. *U. S.* (DC-DC), 63 F. Supp. 1001 off. 3270 S 767.

> "The purpose of the hearing on the motion for summary judgment is not to resolve factual issues. It is to determine whether there is any genuine issue of a material fact in dispute; and if not, to render judgment in accordance with the law as applied to the established facts." Moore's Federal Practice, Vol. 6, Paragraph 56.11, pp. 2057-58 (2d ed., 1948)

While the Court of Appeals indicates "That question largely turns on the effect to be given to the Minnesota judgment," nevertheless that is not the main or principal contention of the Petitioner in his Complaint, for the Minnesota judgment obviously cannot govern or control any conspiracy, and acts performed pursuant thereto, which occurred after its date and entry.

After deciding that the release and the judgment of the Minnesota District Court barred plaintiff from any action against the defendants for acts performed under the conspiracy *prior* thereto, it came to the question of dealing with the proposition to-wit, that Plaintiff-Petitioner in his Complaint asserted a cause of action based upon a conspiracy and acts in consummation thereof, arising *subsequent* to the prior judgment of the Minnesota District Court, and the release executed in said proceedings, and involving defendants who were not parties to the Minnesota litigation.

In its original opinion rendered April 12, 1956, the Court in passing upon this contention in a single paragraph attempted to dispose of the issue by saying:

> "Furthermore, the record leaves no room for doubt that all averments involving defendants grew out of transactions during or antedating the state court proceeding. The only allegations as to any transaction subsequent thereto relates to the asserted fraud of Fiscal, as to whom the district did not have jurisdiction, after the cause had been dismissed as to it."

There was not only the asserted fraud of Fiscal and the remaining Texas defendants, but that of all the defendants in this cause which the Complaint charged were engaged in a common conspiracy pursuant to the acts set forth in the Complaint to defraud and damage Petitioner. See the allegations of par. 22 of the Complaint (Tr. 18-19); also Par. 21 (Tr. 16-17) and pars. 23 and 24 (Tr. 19).

When the Court of Appeals was confronted with this situation in the Petition for Rehearing, it modified this paragraph of its opinion by stating that "the asserted fraud of Fiscal in its default on the promissory note" had the added factor to be considered that the District Court without jurisdiction over Fiscal, "And no well-pleaded fact connects defendants with Fiscal's default."

First let us observe the following time table of events in this litigation which is of the utmost importance:

1. On June 3rd, 1952, the Minnesota courts entered Stipulation, Findings of Facts and Conclusions of Law and an order for judgment.

2. On August 12, 1952 Fiscal Agents entered into contract with Hardy to buy International. (The contract was alleged to be fraudulent in that it was never intended to be carried out but was a device, a sham in the total fraud.)

3. On August 25, 1952, the critical release was signed. In July of 1953, Fiscal Agents, operating International permitted a default to occur in respect of payments on a note for $652,170.15 to secure payment of which all shares owned by the plaintiff were pledged and according to plan, Bankers foreclosed these securities, held a mock auction sale without notice to plaintiff, bought the securities for approximately $340,000 and thereby divested plaintiff of all his properties.

Permitting the default to occur was only one of the acts charged against Fiscal in the Complaint pursuant to the conspiracy. Promises were made to the Petitioner as well as represention by the defendants relating to purported plans for refinancing Petitioner's obligation and indebtedness, and to purchase his properties. (Tr. 17).

Preparation of the note, securing execution thereof and all the other related acts as set forth in the Complaint are acts and facts which occurred after the Minnesota decree and release.

The Court of Appeals by the very language of its amendment to its opinion implies that the facts do appear in the Complaint, but goes on to say that same are not well-pleaded.

The question of whether or not the facts are well-pleaded was not before the Court on the motion for summary judgment either in the District Court or the Court of Appeals, nor was it ever presented, urged, pleaded or argued. Rule 12 (h) of the Rules of Civil Procedure of the United States District Court provides that "a party waives all defenses and objections which he does not present either by motion, as hereinabove provided, or etc." No motion was made here that there were no well-pleaded facts with

relation to the acts of these defendants mentioned in the opinion of the Court of Appeals and set forth more particularly in the Complaint. Once it is admitted that the facts are pleaded in the Complaint, but not well-pleaded, then, of course, the Petitioner would, if the proper motion were made, be allowed to amend and plead his facts well. We repeat, this issue was never raised by the defendants nor was any motion or objection at any stage of the litigation made to the effect that the Complaint failed to state any facts upon which relief could be granted.

In *Lawlor* v. *National Screen Service*, 349 U.S. 322, a situation similar to this was considered. Briefly summarized, the facts are these:

In 1942 an action was commenced under the anti-trust laws by Lawlor against National Screen Service and others. The Complaint alleged a conspiracy to establish a monopoly. In 1943, prior to any trial, the suit was settled on the basis of an agreement by National Screen Service to furnish plaintiffs with all standard accessories distributed by National Screen pursuant to its license agreement with producers. In exchange, the plaintiffs agreed that they would withdraw the suit and pay National Screen for materials at specified prices. The suit was then dismissed with prejudice. The license was to run for three years and in 1946, it was renewed for another five-year term. In 1949 the petitioners brought an action under the anti-trust laws raising substantially the same issues. It was alleged that National Screen had deliberately made slow and erratic deliveries of advertising materials under the sublicense in an effort to destroy plaintiff's business and it also used tie-in sales as a means of exploiting its monopoly power. National Screen made a motion for summary judgment. It was held that those elements of the conspiracy which went beyond the dismissal of the 1942

suit were actionable notwithstanding the dismissal of the prior case with prejudice. So here we contend that the acts of Fiscal Agents, who were not parties to the Minnesota litigation, Bankers Life and the other parties to the conspiracy which occurred subsequent to the Minnesota judgment preclude the entry of an order allowing a motion for a summary judgment.

What was said in *Lawlor* v. *National Screen Service,* 349 U.S. 322 case applies as well to the release pleaded by the defendants as well as to their *res adjudicata* defense. These relevant facts are nowhere denied. They reach beyond the reaches of time limits of the Minnesota judgment and of the release. We contend that Lawlor 349 U.S. 322, controls the decision in this case.

There is no question that the District Court had jurisdiction of the subject matter. The mere fact that Fiscal and the Texas defendants were not served with process did not militate against their being joined as parties to the conspiracy, and their acts in combination with that of the other defendants rendered those who were served with process responsible for any judgment in the cause. The acts of any of these co-conspirators are the acts of all, and for those acts and doings which occurred after the Minnesota decree and release Petitioner has not had his day in Court and the Constitutional requirement of due process has not been observed.

CONCLUSION.

We submit that because the judgment of the Minnesota Court, and the release executed in connection therewith could and did not extend beyond its dated entry and execution, and that the acts performed under and pursuant to the conspiracy subsequent thereto are pleaded in the Complaint, and raise factual issues which for the purpose

of this motion stand admitted and taken as true, the judgment of the Court of Appeals cannot stand, nor that of the District Court because they foreclose Petitioner of his Constitutional right to a trial by jury on certain of the issues of fact presented by his Complaint, and not reached by any proper motion or proceeding in this cause.

Prayer For This Court's Writ of Certiorari.

For reasons apparent from the record and stated in this Petition for Certiorari, Petitioner respectfully prays that this Court issue its Writ of Certiorari to review and reverse the judgment of the United States Court of Appeals for the Seventh Circuit in this case, to the end that Petitioner's rights herein claimed may be effectuated.

Respectfully submitted,

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Certificate and Proof of Service.

Irving Breakstone, hereby certifies that he has caused service of this Petition to be made upon opposing counsel by the sending of three (3) printed copies of the Petition for *Certiorari* and one printed copy of the Transcript of Record in the Court of Appeals to Counsel of record for Respondents at their address as shown of record in that Court.

Irving Breakstone
A member of the Bar of this Court.

APPENDIX I.

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11535. OCTOBER TERM 1955, APRIL SESSION 1956.

J. HERSCHEL HARDY, *Plaintiff-Appellant,*
v.
BANKERS LIFE & CASUALTY CO., *et al.,*
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 12, 1956.

Before LINDLEY and SCHNACKENBERG, *Circuit Judges;* and PLATT, *District Judge.*

LINDLEY, *Circuit Judge.* Plaintiff appeals from a summary judgment dismissing his complaint. For purposes of this memorandum the term "defendants" includes the appellees here, Bankers Life and Casualty Co., Great Plains Hotel Co., Inc., and certain officers of each of those corporations. The reference "Fiscal", when employed, refers to Fiscal Agents, Inc., a Texas Corporation, and certain other parties who were named as defendants below but dismissed from the cause on plaintiff's motion on June 23, 1955.

The complaint averred that defendants had conspired among themselves and with Fiscal through a series of transactions, beginning in 1948, to deprive plaintiff of his rights in some 120 parcels of real estate consisting of hotels, apartment buildings and business properties. The following factual statement, although burdensome, represents the most feasible distillation of the complaint and record sufficient to present the issues.

In 1948 plaintiff owned some 120 hotels, apartment houses and business properties, or equities therein, located in various states. During the year he entered into negotiations with defendant MacArthur, Bankers' president, seeking a loan to meet his needs growing out of demands by the Bureau of Internal Revenue on account of income tax deficiencies. These negotiations resulted in a written agreement whereby, in consideration of MacArthur's promise to arrange loans to plaintiff aggregating approximately $1,000,000, plaintiff undertook to organize an Illinois corporation, to transfer all his property thereto in exchange for all of its capital stock and to meet certain security requirements of the document. The money loaned was to be used only for meeting the obligations of the proposed corporation and plaintiff's income tax obligations. Pursuant to this agreement, plaintiff organized defendant Great Plains Hotel Co., Inc.,[1] and transferred to it all his properties in exchange for all of its capital stock, *i.e.*, ten shares. Subsequent transactions occurred between the parties, including the preparation of a voting trust agreement on December 1, 1949, whereby Hardy agreed to transfer his

[1] Formerly Hardy International Hotel Co., Inc. Since facts related herein refer to events involving this defendant under each of its corporate names, references to this corporation variously appear as "International" or "Great Plains" in accordance with the context of the specific reference.

shares of stock to the trustees in exchange for voting trust certificates executed by them. However, this agreement was never executed. The complaint details numerous oral promises by MacArthur, in addition to those evidenced by the writings to which reference has previously been made, which, allegedly, though never performed, were in their incipiency misrepresentations willfully made with intent to defraud plaintiff.

Various loans were made to plaintiff or International by Bankers. In his complaint, plaintiff asserted that MacArthur refused to perform an undertaking of the original agreement for a loan of $800,000 to International to be secured by first mortgages on that corporation's real property, until plaintiff agreed to pledge his International stock as further security and to deliver complete control of International to MacArthur and Bankers. During the same period, it was alleged, MacArthur caused plaintiff to execute a note in the amount of $250,000 as additional security for loans by Bankers to International and to pledge his stock to secure payment thereof. MacArthur, it was said, represented at that time that no personal judgment would ever be sought on the note. Notice of foreclosure on the collateral was given on September 4, 1951. Plaintiff averred that he tendered cash in full payment of the obligation, but that it was refused. The latter averment was not denied, but it affirmatively appears that, at the time the tender was made, Bankers' acceptance thereof was restrained by an injunction issued in the course of the state court proceeding subsequently discussed.

Meanwhile, on February 17, 1951, plaintiff's wife filed against him in the District Court for the Fourth Judicial District of the State of Minnesota a complaint for divorce, which later was amended by adding Bankers and Great Plains as parties defendant. A second amended complaint

filed March 28, 1952, alleged, *inter alia,* that Bankers and Great Plains had control of plaintiff's properties; that plaintiff was conspiring with those corporations to defraud Mrs. Hardy of her share of plaintiff's property. Bankers answered, denying the averment of conspiracy and asserting as an affirmative defense the existence of a conspiracy between Mrs. Hardy and plaintiff to defraud that company by securing loans based upon fraudulent valuations of property.

This cause came on for trial shortly after March, 1952. On June 3, 1952, the court entered an interlocutory decree, based on its finding, *inter alia,* that no conspiracy to defraud existed between any of the parties. The decree approved a stipulation entered into by the parties on June 2, 1952, and provided that the court retain jurisdiction of the cause for the purpose of carrying it out. This stipulation included Bankers' agreement to refinance and reorganize Great Plains in accord with a plan spelled out therein. The details of this undertaking we consider unimportant in this inquiry, except for the provisions (1) that plaintiff, Mrs. Hardy and Great Plains agreed to convey certain properties to Bankers and the latter to assume all indebtedness against same; (2) that all claims against Great Plains except those evidenced by mortgages on real property would be released by Bankers; (3) that Bankers would cancel the $250,000 note and deliver it to plaintiff together with the ten shares of stock; (4) that Mrs. Hardy was to receive three shares of this stock, which Bankers agreed to purchase from her for $125,000; and (5) that plaintiff was to retain the remaining seven shares as his property. Each party further agreed to release all others from any and all claims except those created by the stipulation.

After this agreement had been approved by the court and incorporated in its interlocutory decree entered June 3, 1952, plaintiff refused to abide by certain of its provisions. On Mrs. Hardy's motion, on June 16, 1952, a rule was entered against plaintiff to show cause why he should not be held in contempt for failure to perform the provisions of the stipulation. Plaintiff replied that he had ascertained that the deal was unworkable and, further, that he had been induced by misrepresentations of MacArthur to make the stipulation. On June 24 the court discharged the rule to show cause. On the same date, plaintiff moved to vacate the stipulation, for several reasons, including an averment of fraudulent representations by MacArthur and others. At the same time a motion was made challenging the jurisdiction of the court to settle the property issues between plaintiff and the other parties in that matter inasmuch as it was argued those issues were beyond the scope of the pleadings. These motions were denied October 2, 1952. Meanwhile, on August 25, 1952, plaintiff executed the release on which defendants herein relied in their motion for summary judgment in the district court. On November 7, 1952, the state court entered judgment, incorporating therein its interlocutory decree and the stipulated property settlement. No appeal was taken from that judgment.

The instant cause was instituted March 29, 1954. In addition to the transactions and court proceedings mentioned, it was averred in the complaint that Fiscal, on August 25, 1952, negotiated an agreement with plaintiff whereby it undertook to purchase from plaintiff the seven shares of stock awarded him by the Minnesota decree for certain valuable considerations including the assumption of payment by Fiscal of a promissory note in the amount of $652,170.15, which Great Plains had executed in favor of

Bankers pursuant to the Minnesota decree, and to secure payment of which the stock had been pledged. It was further alleged that Fiscal never intended to perform this agreement and that it was a participant with defendants in furtherance of the scheme to defraud plaintiff, and that, pursuant to this scheme, Fiscal defaulted on the $652,000 note and Bankers, without notice to plaintiff, foreclosed on the seven shares of Great Plains stock and sold it to itself for a mere fraction of its value. This default occurred in July 1953, some eight months after the entry of the Minnesota decree.

Defendants' motion for summary judgment in the district court was based upon the written release executed by plaintiff on August 25, 1952, in which he released all claims against defendants except those embodied in the June 2, 1952, written stipulation incorporated into the final judgment of the Minnesota court in the divorce proceeding. These documents were asserted as a complete bar to plaintiff's claim, defendants contending that the present cause constituted a collateral attack on the unreversed judgment of the state court.

The motion for summary judgment was granted March 8, 1955. Plaintiff's first appeal from that order was dismissed by this court as premature, it appearing that the complaint asserted a single claim against defendants and Fiscal, that no service could be had on Fiscal, that the judgment order ran in favor of defendants only and that the cause was, therefore, not finally resolved. 222 F. 2d 827. Thereafter, on June 23, 1955, orders were entered upon plaintiff's motions dismissing the cause as to Fiscal and granting final judgment for defendants. This appeal is taken to review that judgment.

The only question before us is whether any genuine issue as to any material fact was raised by the pleadings. Rule 56(c), Federal Rules of Civil Procedure, 28 U. S. C. That question largely turns on the effect to be given to the Minnesota judgment.

Plaintiff asserts that that judgment is void insofar as it purports to settle property rights as between himself and defendants. In this respect he contends that the state court was without jurisdiction to go beyond the pleadings in the divorce action and resolve controversies between plaintiff and defendants, that the judgment itself is merely one step in defendants' alleged conspiratorial scheme and that the release executed pursuant to the judgment is void because it was executed under duress of a threatened contempt citation.

We think these contentions are without merit. Since jurisdiction rests on diversity of citizenship, Illinois law as to defendants' liability governs the decision of this cause. *Sutton* v. *Leib*, 342 U. S. 402; *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. In accord with the Illinois law, we must determine the effect of the judgment under attack by applying the law of Minnesota. *Belton* v. *Fisher*, 44 Ill. 32. See, *Merriam* v. *Merriam*, 207 Ill. App. 474.

We are of the opinion that the Minnesota judgment is *res judicata* as to all issues presented by plaintiff's complaint. There is no contention that the court did not have jurisdiction over the subject matter of that cause or over plaintiff and defendants, Bankers and Great Plains. The only argument urged in this respect is that the settlement of claims and cross-claims between plaintiff and defendants was beyond the scope of the pleadings and that it was therefore beyond the jurisdiction of the court. While the earlier decisions of Minnesota courts are not without apparent conflict on the subject, we think it clear that the

governing rule of the cases is that a judgment going beyond the pleadings is not void when the issues decided thereby are litigated by consent. See *e.g., State* v. *Reed,* 132 Minn. 295, 297, 156 N. W. 127, 128. Moreover, any doubt in earlier case law has been resolved by the provision of Rule 15 of the Minnesota Rules of Civil Procedure for the District Courts that "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. * * *." This rule is specifically applicable to the situation before us.

Furthermore, any assertion that plaintiff failed to understand that the stipulation did resolve all his claims against these defendants is dispelled by the fact that he made two attempts in the prior litigation to nullify that document. Thus this complaint constitutes the third attack which plaintiff has directed against the judgment. In response to a contempt citation growing out of plaintiff's failure to perform in accord with the stipulation, plaintiff asserted that he executed the stipulation in reliance on misrepresentations of all defendants now before us and that his auditors subsequently determined that the deal was unworkable. This contention was rejected by the Minnesota court. Following the contempt proceedings, plaintiff moved to vacate the stipulation urging that it represented merely the fruition of a conspiracy by defendants to defraud plaintiff, and that approval of the stipulation was beyond the jurisdiction of the court in the divorce proceeding. This motion was denied also. Denial of this motion inherently included a determination that the court had jurisdiction of the cause and that no fraud affected its judgment. No appeal was taken. It is axiomatic that authority to determine its own jurisdiction is inherent in the power of a court of general jurisdiction, and that its determination sustaining its own

jurisdiction is not subject to collateral attack. *Walling* v. *Miller,* 138 F. 2d 629, 632, cert. denied 321 U. S. 784 (CA-8).

There can be no doubt as to plaintiff's comprehension of the scope of the Minnesota decree at the time it was entered. The record of that proceeding contains his signed statement that he executed the stipulation against the advice of his attorneys to the effect that he was stipulating himself into bankruptcy.

Insofar as the transactions now complained of occurred prior to entry of the Minnesota decree, all claims arising therefrom were resolved by that decree. *In re Melgaard's Will,* 200 Minn. 493, 274 N. W. 641, was a proceeding in opposition to the final account submitted by the trustees of an express trust. Pursuant to the applicable statute, the trustees had, over a period of several years, submitted annual accounts which had been approved by the court with the consent of all beneficiaries. In opposition to the final account, the latter asserted that these orders approving preliminary accounts had been fraudulently obtained and should be vacated. The court held that these were orders which could not be collaterally attacked and that the beneficiaries' objections thereto constituted such an attack. The language found in 274 N. W. at page 646, is pertinent: "A 'judgment' has been well defined as 'the final consideration and determination of a court of competent jurisdiction upon the matters submitted to it, in an action or proceeding.' 15 R. C. L. 569. Why shouldn't the so-called preliminary orders * * * be considered judgments rendering their subject matter *res judicata?* There was jurisdiction of the subject-matter and of the parties; there was submission of matter for decision, and decision on the merits. There was no contest or trial, but what of it? There was opportunity for contest and trial. That is sufficient. 15 R. C. L. 953. That a judgment is 'based upon an agreed

statement of facts, or if it could be considered a consent judgment, does not lessen its force or effect.' *Woods Brothers Construction Company* v. *Yankston County, S. D.* (CCA), 54 F. 2d 304, 308, 81 A. L. R. 300." The Minnesota law is established by this decision. To the extent that the complaint relies upon transactions antedating the decree, then, it must fail. *In re Melgaard's Will, supra; Oswald* v. *Minneapolis Times Co.*, 65 Minn. 249, 68 N. W. 15; *Harchenko* v. *Harchenko*, 77 N.D. 289, 43 N. W. 2d 200. See *Walling* v. *Miller, supra.*

The conclusion we have reached is not affected by the fact that the defendants MacArthur and Little were not named as parties in the Minnesota action. These individuals are the presidents of defendants Bankers and Great Plains respectively, and the whole basis of plaintiff's attacks before the Minnesota court on the stipulation was his assertion that these two individuals were the instruments of the alleged fraudulent scheme. Thus the fraud issue as to all defendants was injected into that proceeding by plaintiff and was resolved against him.

Furthermore, the record leaves no room for doubt that all averments involving defendants grew out of transactions during or antedating the state court proceeding. The only allegation as to any transaction subsequent thereto relates to the asserted fraud of Fiscal, as to whom the district court did not have jurisdiction, after the cause had been dismissed as to it.

The principles governing relief from void judgments have no applicability to this case. Even the case principally relied on by plaintiff on his major contention that the Minnesota judgment is void does not support his position. *Ingram* v. *Lewis*, 37 F. 2d 259, cert. denied 282 U. S. 842 (CA-10), presents a factual situation embracing the blackest possible machinations by trustees to rob the minor

cestui of his trust property culminating in a release procured from the beneficiary by the trustees' fraud mere hours after he achieved his majority. That release was tied in with a voluntary dismissal, with prejudice, of an action in an Oklahoma court against the trustees, brought purportedly on the *cestui's* behalf, but without his knowledge or consent, by third parties, whose only apparent interest in the transaction was to cut for themselves a slice of the tempting succulent pie. Despite the dark picture of fraud painted, the court stated, 37 F. 2d at page 263, that the Oklahoma judgment could not be collaterally attacked but that "equity may disregard its effect as a release if the dismissal was secured by the trustee" in violation of his fiduciary duty. The distinction between that case and the cause before us is obvious. *Ingram* involved a direct attack in equity to set aside a release procured by the fraud of fiduciaries against an incompetent beneficiary who had not participated in the court proceeding with which the release was connected. On the other hand, the cause before us is a collateral proceeding at law resting on an assertion that the federal courts must wholly ignore a decree entered in an action in which plaintiff participated as a party represented by able counsel at every step of the proceedings, and in which every contention now raised was rejected by the Minnesota court. Relief from that judgment, if warranted, must be sought in a direct proceeding.

The court below properly concluded that no genuine issue as to any material fact was presented for its determination. The judgment is

Affirmed.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX II.

In the United States District Court

* * (Caption—No. 54 C 455) * *

The Order of the District Court Appealed From in this Case.

This Cause coming on to be heard upon the Amended Motion for Summary Judgment of the defendants, Bankers Life and Casualty Co., a corporation, John D. MacArthur, as President, Director, and individually; Leo J. Lehane, George Weaver, Richard A. Keller, Jr., M. H. Wettaw, Charles L. Little, Great Plains Hotel Co., Inc., an Illinois Corporation, Hickory Hotel Co., Inc. a corporation and Andor Beretvas, pursuant to Rule 56 (c) of the Rules of Civil Procedure, and the Court having heard arguments of counsel and being fully advised in the premises, doth find that said defendants are entitled to a Summary Judgment as a matter of law.

It Is Therefore Ordered, Adjudged and Decreed that said defendants' Amended Motion for Summary Judgment be and the same is hereby granted.

Enter

John P. Barnes

Judge

Dated at Chicago, Illinois, this 8th day of March, A.D. 1955.

APPENDIX III.

In The

United States Court of Appeals

For the Seventh Circuit

No. 11535

PETITION FOR REHEARING.

Plaintiff-appellant prays a rehearing in the above entitled case.

His request for rehearing is based upon the proposition that this court misconceived facts upon which its determination is based. This is shown by the following quotation from page 8 of the opinion of Mr. Judge Lindley speaking for the Court.

We quote:

> "Furthermore, the record leaves no room for doubt that all averments involving defendants grew out of transactions during or antedating the state court proceeding. The only allegation as to any transaction subsequent thereto relates to the asserted fraud of Fiscal, as to whom the district court did not have jurisdiction, after the cause had been dismissed as to it."

We contend that this statement cannot be in accordance with the facts for the reason that it is inconsistent with allegations of the complaint, not denied in this case and admitted for the purpose of determining propriety of the allowance of the motion for summary judgment.

We quote paragraph 22 of the Complaint (Tr. 18, 19):

> "22. That certain of the defendants, Bankers Life & Casualty Co., a corporation, John D. MacArthur, and others of the co-conspirators herein, having acquired

certain of the properties of the plaintiff, as hereinbefore set forth, in conjunction with their co-conspirators, Harold J. Knop, Leland Fikes, Fiscal Agents and Southwest Mortgage and Loan Corporation negotiated with the plaintiff to acquire his remaining interest obtained by him pursuant to said Stipulation in the Minnesota litigation hereinbefore set forth, which culminated in that certain purchase agreement marked Exhibit 8 and hereto attached and made part hereof by reference, wherein and whereby plaintiff, relying upon the said agreements therein contained and other false representations, which were never intended to be carried out by said defendants and conspirators consummated the agreement Exhibit 8, each and every term of which, including all related documents and agreements, was part and parcel of the conspiracy, trick, device and scheme to defraud the plaintiff as hereinabove set forth, and received a Note for Nine Hundred and Fifty Thousand Dollars ($950,000.00), and upon which he received between six and seven (6 and 7) payments of One Thousand Dollars ($1,000.00) per month; that thereafter the said Fiscal Agents, Inc. and the other defendants pursuant to the scheme and conspiracy herein, defaulted the first payment due on the said note of Six Hundred Fifty-two Thousand One Hundred Seventy Dollars and Fifteen Cents ($652,-170.15) and as a result of which the other co-conspirator defendants, Bankers Life & Casualty Co., a corporation, John D. MacArthur, *et al,* purported to foreclose the pledge of the capital stock of Great Plains Hotel Co., Inc. and bid in the stock at a purported auction sale on said foreclosure proceedings for approximately Three Hundred Forty Thousand Dollars ($340,000.00) and all without notice to the plaintiff herein; that co-conspirator defendant, Harold J. Knop, received a note for Sixty-Five Thousand Dollars ($65,000.00) as a commission, deducted from the Note for Nine Hundred Fifty Thousand Dollars ($950,-000.00) received by the plaintiff; that the said chain of Hotels and properties and the management thereof were removed temporarily to Dallas, Texas, from where defendants managed and operated the same from

August, 1952 to July of 1953 when the default aforementioned occurred; that promptly upon the said default, co-conspirators, Bankers Life & Casualty Co., a corporation, John D. MacArthur, Charles L. Little, and others of the co-conspirators herein, took over the management, monies and receipts of all the said properties in question; that Fiscal Agents, Inc. cooperating in the conspiracy with their co-defendants aided and assisted them in every way by turning over all books, records, documents and papers and properties of Great Plains Hotel Co., Inc. wherein and whereby plaintiff was finally and completely stripped of any remote semblance and title to any of the One Hundred Twenty (120) properties, which were his and of the value of Fifteen Million Dollars ($15,000,000.00) at the time of the inception of this conspiracy, upon his initial dealings with co-conspirator defendant, John D. MacArthur.

Indeed the opinion of the court elsewhere shows that Fiscal was not the only conspirator in the events which took place subsequent to the Minnesota decree and the execution of the release and in which Fiscal took a part. Thus on page 1 of the Court's opinion the Court says:

"The complaint averred that defendants have conspired among themselves and with Fiscal through a series of transactions . . . to deprive plaintiff of his rights . . ."

Again on page 4 of the Court's opinion the following appears:

"The instant cause was instituted March 29, 1954. In addition to the transactions and court proceedings mentioned, it was averred in the complaint that Fiscal, on August 25, 1952, negotiated an agreement with plaintiff whereby it undertook to purchase from plaintiff the seven shares of stock awarded him by the Minnesota decree for certain valuable considerations including the assumption of payment by Fiscal of a promissory note in the amount of $652,170.15, which Great Plains had executed in favor of Bankers pursuant to the Minnesota decree, and to secure payment

> of which the stock had been pledged. It was further alleged that Fiscal never intended to perform this agreement and that it was a participant with defendants in furtherance of the scheme to defraud plaintiff, and that, pursuant to this scheme, Fiscal defaulted on the $652,000 note and Bankers, without notice to plaintiff, foreclosed on the seven shares of Great Plains stock and sold it to itself for a mere fraction of its value. This default occurred in July 1953, some eight months after the entry of the Minnesota decree."

It is not to be supposed that this court is at liberty to assume, as it did, on page 8 of its opinion, that Fiscal was the only defendant which participated in the events which took place subsequent to the decree in the Minnesota case. The assumption made by this court is not based upon the record. The decision of cases ought not determine facts. Facts ought determine the decisions.

If the allegations of paragraph 22 of the complaint be taken as true, as required by judicial determinations made so frequently that there are now beyond the realm of debate, Bankers Life & Casualty Company, McArthur and all the other defendants were in the conspiracy to defraud plaintiff in all the events in which Fiscal participated as much as Fiscal was. In fact from the allegations, it is reasonably inferable that Fiscal was an agency by which the other defendants achieved their fraudulent goal.

If these facts, as pleaded, and admitted for the purpose of decision in the matter before the court are taken as true, the decision that this court has reached should not stand.

If the defendants, now before this court participated in the conspiracy which took place subsequent to the Minnesota decree it is beyond cavil that judgment may be rendered against them without Fiscal being before the court. It is only by assuming, contrary to fact, that the

defendants before this court now did not participate in the fraudulent events which took place after the entry of the Minnesota decree, that this court could reach the decision which it has reached.

That is the teaching of *Lawlor* v. *National Screen Service*, 349 U.S. 322. There, as here, the plaintiff alleged (a) that the previous decision was a device used by the defendants to perpetuate their conspiracy. (p. 325) (The court decided that issue against the plaintiff). There, as here, plaintiff also alleged (b) conspiratorial acts which took place subsequent to the former judgment.

As to the acts which took place subsequent to the former judgment the Supreme Court reversed the lower court.

This court should do what the Supreme Court did in the *Lawlor* case.

Accordingly we urge this court to grant a rehearing and upon rehearing reverse the lower court with appropriate directions.

Respectfully submitted,

IRVING BREAKSTONE
JOHN O'C FITZGERALD
Attorneys for Plaintiff-Appellant.

APPENDIX IV.

Order of the Court of Appeals denying Petition for Rehearing and Amending Opinion filed April 27, 1956.

United States Court of Appeals

For the Seventh Circuit

No. 11535

It is ordered that the following amendment be made in the Opinion of this Court filed on April 12, 1956:

On page 8, delete the second sentence of the second paragraph, and insert in lieu thereof, the following words:

> "The only allegation as to any transaction subsequent thereto relates to the asserted fraud of Fiscal in its default on the promissory note. The district court had no jurisdiction over Fiscal, and no well-pleaded fact connects defendants with Fiscal's default."

It is further ordered by the Court that the Petition for Rehearing of this cause be, and the same is hereby, *Denied*.

FILED
MAY 26 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 946

J. HERSCHEL HARDY,
Petitioner,

vs.

BANKERS LIFE & CASUALTY CO., ET AL.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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J. HERSCHEL HARDY,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CITATIONS TO OPINIONS BELOW.

A previous opinion in this case, dismissing an earlier appeal, is reported in 222 F. 2d 827.

STATEMENT OF THE CASE.

Petitioner's statement of the case contains much that is immaterial to a proper consideration of the points raised, and omits those facts justifying the lower Court's judgments.

All of the allegedly tortious conduct listed in Petitioner's complaint and in his statement of the case, occurred prior

to November 7, 1952. This was the date of the Minnesota judgment held to be a bar to recovery. (Tr. 43.)

After that date, Petitioner's rights were bound up in his purchase agreement with Fiscal Agents, Inc. (Tr. 61-94.) No allegation with reference to a conspiracy to breach this contract was made. Yet, all other matters complained of antedated November 7, 1952.

ARGUMENT.

I.

Subsection (6) of Rule 19 provides that this Court's discretion to grant certiorari may be exercised when a conflict between circuits arises from the decision; when the decision on a matter involving State or territorial law is in conflict with the applicable law; when an unresolved and important question of federal law should be settled by this Court; when a federal question has been decided in a manner in conflict with this Court's decisions; or, when a departure from the judicial norms requires the excuse of the Court's power of supervision. None of these categories is involved in the instant case.

The case involves a suit for damages grounding federal jurisdiction only upon diversity of citizenship and the required jurisdictional amount. (Tr. 4-5.) Resolution of Respondents' liability, as the Court of Appeals pointed out (Tr. 23) depended upon interpretation of Illinois and Minnesota law. The Court's interpretation is not challenged.

No question presented by the petition falls within the other categories of Rule 19. No threat of conflict exists on any level nor is this an occasion for the exercise of this Court's power of supervision.

The facts of the case, ar from commending this cause to the unenunciated discretion reserved by Rule 19, indicate that no valid reason exists for the granting of certiorari.

II.

In his argument, Petitioner abandons the broader issues formulated in his "Quesions Presented for Review". This narrowing eliminates any attack on the holding that recovery could not be had for any actions occurring prior to November 7, 1952, the date of the judgment pleaded in bar. (Tr. 43-48.) This date is ignored in the timetable furnished to this Court on pages 12 and 13 of his Petition. After ignoring this date Petitioner states (page 13, Petition):

> "Preparation of the note, securing execution thereof, and all the other related acts as set forth in the Complaint and acts and facts which occurred after the Minnesota decree and release."

The note referred to was attached to Petitioner's complaint as Exhibit 9 (Tr 16, 17, 94-96) was dated June 13, 1952, long prior to the November 7, 1952, date.

Further, the promises and representations relating to refinancing this obligaton and indebtedness, and the purchase of his properties described on page 13 of the Petition, all antedated the purchase agreement set forth in Exhibit 8 attached to Petitioner's complaint. (Tr. 61,94.) This agreement is dated August 5, 1952, also long before the "cut-off" date in November.

The only allegation of any activity subsequent to November 7, 1952, is that contained in paragraph 22 of the complaint (Tr. 18) which states that "Fiscal Agents, Inc.," an unserved defendant defaulted the payment due on a note.

Rule 56 (c) of the Rules of Civil Procedure for the United States District Courts, states:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact *and that the moving party is entitled to a judgment as a matter of law.*" (Emphasis supplied.)

In their motion for summary judgment, Respondents pleaded the bar of the Minnesota judgment and were upheld by the lower Court, and the Court of Appeals. Once the November 7, 1952, date was accepted, the legal basis for recovery established by the Complaint was destroyed. As a matter of law, in conformity with the Rule, Respondents were then entitled to judgment.

After the November 7, 1952 date, all of Petitioner's rights were bound up in his contract with Fiscal Agents, Inc. (Tr. 61-94.) The sole basis for recovery after that date would have to relate to some variety of tortious conduct with respect thereto. The contract alone would be the source of any duty owed Petitioner by Fiscal Agents, Inc. The present Respondents were not parties to that contract and could not be charged with any obligation to Petitioner flowing from that instrument. Nowhere was there any allegation of a breach of that contract.

Charges of conspiracy alone cannot support a complaint. Tortious conduct, alleged and proved, is the only legal predicate of recovery. *Brictson* v. *Woodrough*, 164 F. 2d 107, 109; *Scavenger Service Corp.* v. *Courtney, et al.*, 85 F. 2d 825, 832. The District Court, and the Court of Appeals, in turn, correctly denied that any tortious acts for which Respondents could be held liable, occurred after November 7, 1952.

Petitioner's failure to allege any facts which would

establish liability is transmuted into a denial of due process, through denial of his day in court. As the Court of Appeals pointed out (Petition, p. 24) "This complaint constitutes the third attack which plaintiff (Petitioner) has directed against the judgment." The Court of Appeals repelled the fourth attempt. He now seeks to enlist this Court's aid for still another "day in Court".

The onus was on Petitioner to allege facts occurring after the date of November 7, 1952. Implicit in the judgment of the District Court and explicit in the opinion of the Court of Appeals is his failure in this aspect. Any waiver of defenses and objections under Rule 12 (h) of the Federal Rules, was Petitioner's and not Respondents'. On his failure to state those facts upon which relief could be granted, or to ask leave to amend, if possible, the Court below properly entered summary judgment.

Conclusion.

Petitioner seeks to use the Federal Court System as a vehicle to rehash matters long settled. The proper avenues provided by the Minnesota Courts were ignored. The benefits of summary proceedings are nowhere better illustrated than in this case. Respondents, in vindication, have been forced to contest in the lower Courts and now in this Court. The cause should proceed no further.

We respectfully urge that this petition and writ of certiorari be denied.

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Attorneys for Respondents.